IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 1357 OF 2005.

Mrs.Usha Badri Poonawalla,
Age: 44 years, Occ.: Business,
residing at 93, Mahatma Gandhi
Road, Pume Camp, Pune 411 001. .... Petitioner.

Versus.

1. K.Kurien Babu,
   Age: 66 years, Occ.: Business,
   residing at 1, Tamanna,
   Viman Nagar, Pune 411 040.

2. Stae of Maharashtra. .... Respondents.

Shri S.R.Chitnis, Senior Counsel with Shri J.B.Kocheta for the Petitioner.

Respondent No.1 in person.

Shri K.V.Saste, A.P.P. for the Respondent No.2.

CORAM : ABHAY S. OKA, J.

DATED : 8th September, 2005.

ORAL JUDGMENT.

1. This Petition has been assigned to this Court by order dated 27th June 2005 passed by the Hon'ble the Chief Justice. On 6th July 2005 by consent of the learned Counsel appearing for the Petitioner and the Respondent No.1 appearing in person, this petition was taken up for final hearing. Thereafter I have heard learned Counsel appearing for the Petitioner and the

Respondent No.1 in person. I have perused two separate written submissions filed by the Respondent No.1 appearing in person. Though today the petition is fixed for dictation of judgment, I have heard the submissions made by the Respondent No.1 appearing in person for few minutes.

2. This is a petition filed under Article 227 of the Constitution of India and section 482 of the Code of Criminal Procedure, 1973. The petition arises out of a complaint filed by the Respondent No.1 against the Petitioner under the provisions of section 138 of the Negotiable Instruments Act, 1881. The prayer in the petition is for quashing and setting aside the order passed by the learned Judicial Magistrate First Class, Court No.5, Pune, below Exh.1 in a complaint filed by the Respondent No.1 by which the learned Judge directed to frame charges against the Petitioner under the provisions of section 138 of the said Act of 1881. A prayer is also made for quashing the proceedings of the complaint in view of the composition of the dispute between the Petitioners and the Respondent No.1 in terms of the Memorandum of Understanding dated 9th September 1997. In the alternative, a prayer is made for discharge. It must be recorded here that this petition

pertains to the assignment of another learned Single Judge of this Court. By order dated 10th June 2005 the concerned learned Single Judge declined to take up the petition. By order dated 27th June 2005 passed by the Hon'ble the Chief Justice, this petition has been assigned to this Court.

3. With a view to appreciate the submissions made by the learned Counsel appearing for the Petitioner and the Respondent No.1 appearing in person, it will be necessary to refer to the facts of the case. The complaint filed by the Respondent No.1 is based on a cheque in the sum of Rs.8,90,680/- dated 29th October 1996 allegedly drawn by the Petitioner in favour of the Respondent No.1. A notice dated 19th November 1996 was issued by the Advocate for the Respondent No.1 to the Petitioner calling upon the Petitioner to pay the cheque amount within a period of 15 days. The case made out by the Respondent No.1 in the said notice is that from time to time the Respondent No.1 rendered financial assistance to the Petitioner. According to the Respondent No.1, he had paid a total sum of Rs.7,10,000/- by way of financial assistance. According to the case of the Respondent No.1, cheque amount of Rs.8,90,680/- consists of the principal amount of

Rs.7,10,000/- and Rs.1,80,680/- being the agreed interest at the rate of 24% thereon. The Respondent No.1 stated that the cheque was returned dishonorued with remark of the bankers that the funds were insufficient. The notice was replied to by the Petitioner by reply dated 7th December 1996 sent by the Advocate for the Petitioner. In the reply there is a denial by the Petitioner of having issued the cheque. The allegation in the reply is that the Respondent No.1 was acquainted with the Petitioner for reasonably long time and used to visit the Petitioner's office. It is alleged that the Respondent No.1 got hold of some documents including the cheque in question. A private complaint was filed by the Respondent No.1 on 10th January 1997 and after recording the verification of the Respondent No.1, the learned Magistrate issued process on 18th June 1997.

4. It appears that the Petitioner filed a document at Exh.17 which is allegedly signed by the Respondent No.1 and the Petitioner before the trial Court. The said document is styled as Memorandum dated 9th September 1997. The Respondent No.1 filed an Application before the learned Magistrate praying that the said document at Exh.17 may be kept in sealed

envelop in the custody of the Nazir of the Court. In the said application the Respondent No.1 alleged that the Application at Exh.17 was never moved by him. On 10th November 1997, the learned Magistrate passed an order observing that in the document at Exh.17 no effective prayer was made by either party and therefore, the document at Exh.17 ordered be just filed without any effective relief. The learned Magistrate passed a separate order on the application made by the Respondent No.1 at Exh.18 by which he rejected the prayer made in the said application. The Respondent No.1 on 10th November 1997 made the application praying that the offence under section 193 of the IPC be added in the list of other offences for which the Petitioner is already being charged. The allegation made in the Application was that filing of document at Exh.17 by the Petitioner amounts to fabricating the evidence in a judicial proceeding. The learned Magistrate rejected the said application by order dated 6th December 1997. It appears that the said order was impugned by the Respondent No.1 by filing Criminal Writ Petition No.106 of 1998 in this Court. This Court disposed of the Writ Petition by order dated 13th February 1998. This Court rejected the petition by keeping open the right of the Respondent No.1 to file fresh application under section

340 read with section 195 of the said Code of 1973 before the learned Magistrate.

5. The Petitioner herein filed Criminal Writ Petition No.870 of 1998 in this Court. The prayer in the said petition was for quashing the order of issuance of process and for dismissal of the complaint. The said petition was filed mainly relying upon the document at Exh.17 which according to the Petitioner was a Memorandum of Understanding executed between the parties. A contention was raised that the Court must give effect to the Memorandum of Understanding. It was also alleged that the cheque in question was never drawn by the Petitioner and in fact it was a stolen cheque. The said Writ Petition was disposed of by order dated 16th January 2002 by a learned Single Judge of this Court. The learned Single Judge recorded the statement of the learned Counsel for the Petitioner that the Petitioner shall move an application for discharge after which the learned Magistrate can record evidence on the application of discharge including the evidence of the hand writing expert and after recording the evidence adduced by the parties, the learned Magistrate shall pass appropriate orders on the Application in accordance with law. This Court directed the learned Magistrate to

consider the issue of taking action under section 340 of the said Code based on his findings on the discharge application in case he finds that the cheque on which the prosecution is based is a product of forgery. The said original cheque which was produced in this Court by the Respondent No.1 was ordered to be sent back to the Court of the learned Magistrate in a sealed cover along with the opinion of the expert Shri Phansalkar. The learned Judge observed that the attempt of settlement of dispute by the parties by entering into memorandum of understanding appears to have failed. Subsequently by order dated 23rd September 2002 passed under section 259 of the said Code of 1973, the learned Magistrate directed that the case be converted into warrant triable case and accordingly the Respondent No.1 was directed to lead evidence before charge. In the evidence led by the Respondent no.1, he produced original memorandum of understanding dated 9th September 1997 in evidence and the same was duly proved in evidence and was exhibited as Exh.58. By order dated 19th March 2005, the learned trial Judge held that prima-facie case is made out for framing charge under section 138 of the said Act. The said order was impugned by the Petitioner by filing a Revision Application. The Revision Application came to be rejected.

6. The learned Counsel appearing for the Petitioner submitted that the Memorandum of Understanding dated 9th September 1997 (hereinafter referred to as "the said Memorandum") was produced and proved in evidence by the Respondent No.1 himself and as the Respondent No.1 admitted that he has received all the amounts which are mentioned in the Memorandum, it is obvious that the prosecution cannot proceed further. He submitted that the Memorandum itself records that the Respondent No.1 will withdraw the criminal case filed by him. He submitted that as the execution of the Memorandum is admitted, the learned Judge should not have framed the charge. He pointed out that some of the amounts mentioned in the Memorandum are admittedly received by the Respondent No.1 before filing of the complaint and the said fact was suppressed by the Respondent No.1 while filing the complaint. He submitted that in any event, in the light of the document i.e. the said Memorandum at Exh.58, the continuation of prosecution by the Respondent No.1 was an abuse of process of law and therefore, the same deserves to be quashed by exercising power under section 482 of the said Code of 1973. He pointed out that even the original cheque was not produced by the Respondent No.1 and only on the basis of

the order passed by this Court, the cheque was produced by the Respondent No.1. He pointed out that in the earlier petition, the relief was claimed on the basis of the Exh.17 and now the relief is claimed on the basis of the document at Exh.58. The learned Counsel for the Applicant relied upon certain decisions in support of his case reference to which will be made in the later part of this Judgment.

7. The Respondent No.1 appearing in person submitted that in the earlier petition filed by the Petitioner the prayer for quashing was made on the basis of the same Memorandum and the said prayer has been expressly rejected. He submitted that quashing the proceedings on the basis of the same document in this petition will amount to reviewing the earlier order passed by this Court. It is submitted that there is no power of review vesting in this Court. He submitted that as a result of the failure of the Petitioner to comply with the demand notice, offence under section 138 of the said Act of 1881 was made out and even assuming that under the said Memorandum he has received certain amount, the learned Magistrate was justified in framing the charge. He submitted that the interpretation of the Memorandum is a matter of evidence. He submitted that

apart from the amounts which are mentioned in the Memorandum, the Petitioner had agreed to pay certain amounts in cash to the Respondent No.1 which has not been paid. He submitted that the order directing framing of charge does not decide any rights of the parties and therefore, this Court should not interfere with the said order. He submitted that the proceedings cannot be quashed on the basis of the Memorandum as the said attempt made by the Petitioner has already failed in the earlier petition. He has placed reliance on several decisions of this Court and the Apex Court and reference to the same will be made at a later stage.

8. I have considered the rival submission. It is borne out from the record that the notice as required by the provisions of section 138 of the said Act of 1881 was issued to the Petitioner by the Respondent No.1 calling upon the Petitioner to pay the said amount. The notice was not complied with and therefore, a complaint came to be filed by the Respondent No.1 on which process has been issued. The Respondent No.1 appearing in person has placed reliance on the ruling of the Apex Court reported in 2001 (1) S.C.C. Page 631 (Rajneesh Aggarwal v/s. Amit J.Bhalla). The Apex Court held that even if during the pendency of the prosecution the

entire amount involved was deposited by the Accused, the same does not absolve the accused of criminal liability and therefore, on the ground of deposit of the entire amount, the complaint cannot be quashed. Paragraphs 7 and 8 of the said decision read thus:

> "7. So far as the question of deposit of the money during the pendency of these appeals is concerned, we may state that in course of hearing the parties wanted to settle the matter the Court and it is in that connection, to prove the bona fides, the respondent deposited the amount covered under all the three cheques in the Court, but the complainant's counsel insisted that if there is going to be a settlement, then all the pending cases between the parties should be settled, which was, however not agreed to by the respondent and, therefore, the matter could not be settled. **So far as the criminal complaint is concerned, once the offence is committed, any payment made subsequent thereto will not absolve the accused of the liability of criminal offence, though in the matter of awarding of sentence, it may have some effect**

> **on the court trying the offence. But by no stretch of imagination, a criminal proceeding could be quashed on account of deposit of money in the court or that an order of quashing of criminal proceeding, which is otherwise unsustainable in law, could be sustained because of the deposit of money in this Court. In this view of the matter, the so-called deposit of money by the respondent in this Court is of no consequence.**
>
> 8. In the aforesaid premises, we set aside the impugned orders of the High Court and allow these appeals and direct that the criminal proceedings would be continued. The money which had been deposited by the accused in this Court, may be refunded to the accused through his counsel. The Magistrate is directed to dispose of the proceedings at an earlier date." (Emphasis supplied).

The said decision is an authority for the proposition of law that even if the amount covered by the cheque is deposited in Court during the pendency of the complaint under section 138, it is no ground for quashing the proceedings. It must be borne in mind that in the said

decision in the case of Rajneesh (supra) the quashing was not sought on the ground that there was a compromise arrived at between the parties and the amount was not deposited pursuant to compromise between the parties. In the case before the Apex Court the deposit was for showing bona fides. The Respondent No.1 also invited my attention to the decision of the Apex Court reported in (2000) 7 S.C.C. page 388 (Cranex Ltd. and another v/s. Nagarjuna Finanance Ltd.& another). This was a case where order of conviction and sentence was passed under section 138 of the said Act of 1881. An appeal was preferred before the Sessions Court challenging the order of conviction. Subsequently there was a compromise between the parties. The observations of the Apex Court in paragraphs 7 to 9 of the said decision are thus:

> "7. **The appellate Court will consider the subsequent events, namely, of the appellant having paid a sum of Rs.5,96,688/- under a settlement to the 1st respondent and will dispose of the appeal in accordance with law. On merits, it will be open even to set aside the conviction in accordance with law. Otherwise, it has power to convict or direct**

sentence of imprisonment or fine. The appellate court can therefore take the subsequent events into account and pass such order as it may deem fit in the appeal. Under section 138 the Court can, if it is inclined to convict, pass an order of imprisonment or even fine.

8. The impugned order passed by the High Court in the present interlocutory proceedings is set aside and the matter is remanded to the appellate court, namely the VIth Additional Metropolitan Magistrate Sessions Judge, Secunderabad, as stated above.

9. We also record the statement of the learned counsel for the respondent that if the amount deposited is permitted to be withdrawn by the first respondent, then the 1st respondent will not press before the appellate court for a conviction or for a sentence, be it for imprisonment or fine. In such circumstances, the appellate court will consider whether the conviction is to be maintained or an order of imposition of fine

> is to be passed, in the light of the stand taken by the counsel for the 1st respondent." (Emphasis supplied).

A perusal of the said decision of the Apex Court shows that during the pendency of the appeal against the order of conviction, certain interim applications were filed by the Appellant in the appeal and the said applications were dismissed. Being aggrieved by the said order, a Revision Application was filed before the High Court which came to be dismissed. A Special Leave Petition was filed against the order of the High Court and during the pendency of the S.L.P. there was a compromise between the parties as a result of which certain amount was deposited by the accused in the trial Court. Considering the fact that there was subsequent development during the pendency of the Appeal which arose out of interlocutory application, the Apex Court remanded the matter to the Appellate Court for considering the subsequent event of payment of certain amount under a settlement. The apex Court observed that on merits it will be open for the Appellate Court even to set aside the conviction in accordance with law. The Apex Court directed that the Appellate Court can take subsequent events into account and pass such order as it

may deem fit. Thus the Apex Court remanded the matter to the Appellate Court to consider the subsequent event and clearly observed that in view of the subsequent event, it will be open for the Appellate Court to set aside the order of conviction. The Respondent No.1 has made submission based on another decision of the Apex Court reported in 1999 Cr.L.J. page 4606 (K.Bhaskaran v/s. Shankaran Vaidhyan Balan & anr.). He pointed out that the Apex Court held that the offence under section 138 is complete on the failure of the drawer to pay the cheque amount within 15 days from the date of giving notice. Relying upon the ratio of the said decision, he submitted that the order directing framing of charge under section 138 cannot be interfered with as prima-facie, the offence is complete.

9. It must be noted here that by the Negotiable Instrument (Amendment and Miscellaneous Provisions) Act, 2002, the said Act of 1881 was amended. By incorporation of section 147, the offence punishable under said Act of 1881 was made compoundable. It is true that the said provision was brought on the statute book during the pendency of the complaint but after execution of Memorandum by the Respondent No.1. Nevertheless the legislative intent as reflected in the

said amended provision will have to be kept in mind.

10. The aforesaid submission made by the Respondent No.1 may certainly help the Respondent No.1 in defeating the prayer made by the Petitioner in so far as the challenge to order dated 19th March 2005 passed by the trial Court is concerned. The trial Court has held that prima-facie offence under section 138 is made out and therefore, charge be framed. The trial Court may be justified in recording a finding that prima-facie case is made out for framing charge. If the prayer in this petition was only as regards challenge to the said order passed by the learned Magistrate, it was not necessary to go into the other aspects of the matter.

11. The prayer in this petition is also for quashing the prosecution on the basis of the memorandum at Exh.58. One of the submissions made by the learned Counsel appearing for the Petitioner is that in view of the admission by the Petitioner regarding the said document, the continuation of the prosecution will be an abuse of process of law. The question before me is whether the power under section 482 of the Code can be exercised in the facts of this case. There is no

gainsaying that the power under section 482 can be exercised, in a given case, even when there is a prima-facie material on record to show that a case of commission of offence is made out.

12. Before dealing with the position of law, it will be necessary to go into the details of the factual aspect of the case. When a copy of the said Memorandum dated 9th March 1997 was sought to be produced by the Petitioner at Exh.17 it was objected to by the Respondent No.1. In fact, as stated earlier the Respondent No.1 made an application for contending that the production of the said document amounts to fabrication of evidence. A perusal of the record which is produced before me shows that till the evidence before charge was recorded, the Respondent No.1 was disputing the execution of the said Memorandum. In fact when the application made by the Respondent No.1 for adding charge under section 193 of the Indian Penal Code was rejected, he came to this Court by way of a Writ Petition. In Criminal Writ Petition No.1202 of 1999 filed by the Respondent No.1, his contention was that the document at Exh.17 was a false and bogus document. When the earlier Writ Petition was filed being Criminal Writ Petition No.870 of 1998, it is an admitted position

that the Memorandum dated 9th September 1997 was not proved in evidence. In fact at that stage, the evidence was not led by the parties. It is true that the prayer for quashing was made on the basis of the same Memorandum. This Court while disposing of the said petition has referred to the said Memorandum and has observed that the efforts for settling the dispute have failed. However, this Court permitted the Petitioner to apply for discharge. It is obvious that the observation which is made by this Court relating to the said Memorandum was based on the material on record at that time. At that stage, the Respondent No.1 had not admitted the execution of the Memorandum. After the case was converted into a warrant triable case, the Respondent No.1 stepped into the witness box. In paragraph 4 of his deposition, the Respondent No.1 deposed thus:

> "4. Due to intervention of many friends, we agreed to compromise on this issue and accused agreed to pay full amount of Rs.8,19,680/- vis-a-vis **we have prepared a memorandum of understanding on 10.9.1997. The original M.O.U. is placed on record. It is now shown to me is the same. It bears my**

> **signature as well that of accused. Contents therein are true and correct. The M.O.U. is marked Ex.58." (Emphasis supplied).**

Thus he stated that due to intervention of friends, the parties agreed to compromise and accordingly agreed to pay full amount of Rs.8,19,680/-. He stated that the Memorandum of Understanding was prepared. He in fact filed the original Memorandum of Understanding and admitted execution thereof by himself and by the Petitioner. The said document was therefore marked as Exhibit 58. He specifically stated that the contents of the said Memorandum of Understanding (Exh.58) were true and correct. The said Memorandum of Understanding reads thus:

> "This is to state that I Mrs.Usha Poonawalla alias Usha Badri Taherbhoy have paid and Mr.Kurian Babu have received the following payments. **This is further to state that irrespective of the claim made by Shri Kurian Babu and the refutal made by me in the Criminal Case No.10/1997 pending before the Hon. J.M.F.C. Couirt No.5 Shivaji Nagar, Pune, the money matters involved in the said above case has been settled amically.**

Details of payment.		Amount
21/12/1996	By Cheque No.126378 drawn on Punjab & Sindh Bank.	23,000/-
21/12/1996	By Cheque No.126379 drawn on Pnnjab & Sindh Bank.	50,000/-
23/12/1996	By cheque No.126385 drawn on Punjab & Sindh Bank.	27,000/-
24/01/1996	By cheque No.129322 drawn on Punjab & Sindh Bank.	25,000/-
24/01/1997	By cheque No.129323 drawn on Punjab & Sindh Bank.	30,000/-
12/08/1997	By Bankers Cheque No. 289-97 by Punjab & Sindh Bank.	75,000/-
	By cash.	1,06,600/-
	By cash being payment made to Essanda Finance by Falcon Services	40,296/-
	Total :	3,76,896/-

And therefore, as is mutually agreed, the Criminal Case No.101/1997 pending before the Hon.J.M.F.C. Court No.5 is decided to be withdrawn and Mr.Kurian Babu, the Complainant will make a suitable application before the Hon.Court on 10th Sept.1997 based on this

memorandum of understanding recorded today the 9th Sept. 1997.

Sd/- (Mr.Kurian Babu). Sd/- (Mrs.Usha Poonawala alias Usha Badri Taherbhoy.)

(Emphasis supplied).

The Memorandum refers to the payments made by the Petitioner to the Respondent No.1 partly by six cheques and partly by cash totalling to Rs.3,76,896/-. The Memorandum also records that it was mutually agreed that the Criminal Case pending in the trial Court will be withdrawn and the Respondent No.1 will make a suitable application on 10th September 1997 based on the said Memorandum of Understanding. It is to be noted that the Respondent No.1 in the Examination-in- chief admitted that the contents of the said Memorandum were true and correct. In paragraph 5 of the examination-in-chief, the Respondent No.1 stated that as per the Memorandum, the Petitioner ought to have given him an amount of Rs.5 lakhs approximately before 10th September 1997 and only on receiving the said amount, he was to make an application for withdrawal of the case. The paragraph 5 reads thus:

"5. As per M.O.U. accused ought to have given me an amount of Rs.5 lac approximately

> before 10.9.1997 and on receiving the amount I was to have made an application for withdrawal of the case. On 10.7.1997 the Presiding officer of the Court was on leave. The said M.O.U. is converted into application by accused and filed at Ex.17. I objected the said application after coming to know about its filing vide Ex.17. Therefore application Ex.17 came to be filed."

In paragraph 16 of the cross-examination, the Respondent No.1 admitted that the cheques which are referred to in the first four items of the Memorandum at Exh.58 were encashed. In paragraphs 16 and 17 the Respondent No.1 has stated thus:

> "16. I have filed my income tax return for the year 1994-95 on 12.7.1995 and for 1995-96 on 20.9.1996. I had received cheque No.126378 drawn on Punjab & Sindh Bank issued by accused on 30.12.1996 and same has been credited to my account on 3.1.1997. Likewise cheque No.12379 drawn on Punjab and Sindh Bank issued by accused was received by me on 30.12.1996, and it was credited 3.1.1997. Again cheque

No.126385 was received by me on 30.12.1996 credited to my account on 3.1.1997. Cheque No.129322 was received by me on 25.1.1997 and credited to my account on 30.1.1997.

17. It is true that prior to the institution of the complaint I have received the cheque and encashed the same on 3.1.1997. It is true that the compromise was actually finalised prior to 20.12.1996. It is true that I have not mentioned the above said compromise and receipt of three cheques in my complaint. Adv.Chanddar Parwani was also one of the mediators. I am not going to examine Adv. Chandar Parwai nor Surendra Sanas. Today I cannot state whether I am going to examine any other witness in support of my case. I did not feel it necessary to mention about the compromise and receipt of aforesaid three cheques in my complaint."

In paragraph 13 of the cross-examination of the Respondent No.1, he admitted that the contents of Exh.58 and Exh.17 except the title are same. The reference to the title appears to be to the portion in hand writing

added above Exh.17 viz.

"In the Court of J.M.F.C. Court No.5
K.K. Babu ... Complainant
v/s.
Usgha Poonawala.. Accused."

He also admitted that it has not been written in Exh.58 as well as Exh.17 that accused would return amount of Rs.5,00,000/- on or before 10.9.1997. Paragraph 13 reads thus:

"13. **It is true that the contents of Ex.58 and Ex.17 except the title, are same.** It is not true to say that I have fabricated Ex.58 by putting a white paper in the title. I agree the remaining contents of Ex.17 except the last paragraph. It is true that the contents therein are word towards same. **It is true that it has not been written in Ex.58 as well as Ex.17 that accused would return amount of Rs.5,00,000/- on or before 10.9.1997.** It is true that it is also not written therein that I would withdraw the above said case if I would get the abovesaid amount. According to me, I have an objection that Ex.17 has been produced by accused behind my back to obtain discharge order. It is true that there was no specific

prayer for withdrawal of the case in Ex.17. About Ex.17 I came to know in the same day evening or on the next day. **It is true that it is not my case that MOU is wrong or false."**

(Emphasis supplied)

In the cross-examination, the Respondent No.1 stated that the Petitioner had borrowed a sum of rs.7,40,000/- out of which approximately a sum of Rs.3,55,000/- was paid by her in cash. In paragraph 18 of the cross-examination he stated that he had advanced a sum of Rs.4,55,000/- in cash to the Petitioner.

13. Immediately after document at Exh.17 was filed, on 10th November 1997, the Respondent No.1 had made an application alleging that by taking out Exh.17 the Petitioner has fabricated the evidence. In examination-in-chief which was recorded in the year 2003-2004, the Respondent No.1 not only produced the original Memorandum on record but also admitted that the contents thereof are true and correct and in fact he admitted execution of the said document. He also admitted that he has received the cheques mentioned in the said Memorandum and encashed the same. In fact atleast three cheques are admittedly encashed by the Respondent No.1 before filing the complaint. However,

there is no reference to the said cheques in the complaint filed by the Respondent No.1.

14. Whether the Petitioner is entitled to the relief of quashing is a different aspect. However, the fact remains that the situation which was prevailing when this Court disposed of the earlier petition filed by the Petitioner on 16th January 2002 was totally different from the situation as we see today after the evidence before the charge is recorded. Now the Respondent No.1 admitted the correctness of the contents of the Memorandum and the execution thereof and receipt payment under the said document. It is also true that in the earlier writ petition, relief was sought on the basis of Exh.17 and now relief is sought on the basis or the original of the same document at Exh.58 which is produced and admitted in evidence at the instance of the Respondent No.1. Number of decisions have been cited by the Respondent No.1 pointing out that this Court is bound by its earlier order dated 16th January 2002 and grant of any relief on the basis of the same document would amount to reviewing the earlier decision which is impermissible in law.

15. It is to be borne in mind that this Court has power under section 482 of the said Code to quash a proceeding. It will be necessary to refer to the important decision of the Apex court which considered the scope of the power of this Court under section 561(A) of the old Code. Section 482 of the present Code corresponds to section 561(A) of the Code of 1898. The Apex Court in a case reported in (1975) 3 S.C.C. page 706 (Superintendent and Remembrancer of Legal Affairs, West Bengal v/s. Mohan Singh and others) has taken a view that though earlier application under section 561(A) is rejected by the High Court, a fresh application for quashing can be entertained in a changed set of circumstances. In the case before the Apex Court by order dated 12th December 1968 the High Court refused to quash the proceedings of a complaint. However, on a subsequent petition, by order dated 17th April 1970 the High Court quashed the complaint. A submission was made before the Apex Court that the sequent application for quashing could not have been entertained by the High Court. The Apex Court held that section 561(A) preserves inherent powers of the High Court to make such order as it deemed fit to prevent abuse of the process of law or to secure ends of justice and the High Court must therefore exercise its inherent powers having

regard to the situation prevailing at the point of time when its inherent jurisdiction is sought to be invoked. The Apex Court proceeded to hold thus:

> "It is difficult to see how in these circumstances, it could ever be contended that what the High Court was being asked to do by making the subsequent application was to review or revise the order made by it on the earlier application. **Section 561A preserves the inherent power of the High Court to make such orders as it deems fit to prevent abuse of the process of the Court or to secure the ends of justice and the High Court must, therefore, exercise its inherent powers having regards to the situation prevailing at the particular point of time when its inherent jurisdiction is sought to be invoked. The High Court was in the circumstances entitled to entertain the subsequent application of respondents Nos.1 and 2 and consider whether on the facts and circumstances then obtaining the continuance of the proceeding against the respondents constituted an abuse of the process of the Court or its quashing was**

necessary to secure the ends of justice."

(Emphasis supplied).

The ratio of the decision of the Apex Court in the case of Superintendent and Remembrancer (supra) is squarely applicable to the facts of this case. When the application for quashing is made, the fact situation prevailing as of today will have to be considered. As held by me earlier, there is a drastic change brought about by the production of the Memorandum by the Respondent No.1 himself in evidence and the admission of the correctness of contents thereof by him. Therefore, there is no merit in the said contention that entertaining of this petition for quashing will amount to review of the order dated 16th January 2002 in earlier Criminal Writ Petition No.870 of 1998 filed by the Petitioner. When the said petition was heard the Respondent No.1 was referring to the copy of the same document which was on record as a fabricated document.

16. At this stage a reference will have to be made to the decision of the Apex Court relied upon by the learned Counsel for the Petitioner, reported in (2005) 3 S.C.C. page 302. (Mohammed Shamim & others v/s. Nahid Begum (Smt.) & another). The said case arose out of a

case registered under sections 406 and 498-A read with section 34 of the Indian Penal Code. During the course of hearing of the application for anticipatory bail, there was a compromise arrived at between the parties where the Respondent before the Apex Court agreed to receive certain amount from the Appellant. On the basis of the settlement, a petition was filed in the High Court for quashing under section 482 of the said Code of 1973. The petition for quashing was based on the agreement entered into between the parties. The High Court refused to interfere by observing that the Complainant was not willing to compromise and wants to continue her complaint. The Apex Court in paragraphs 11 to 13 held thus:

> "11. Before us, there is no denial or dispute as regards the factum of entering into the aforementioned settlement dated 14-11-2002. In the said deed of compromise it has categorically been averred that the same had been entered into on the intervention of S.N.Gupta, Additional Sessions Judge, Delhi. It has also been accepted that out of sum of Rs.2,75,000, a sum of Rs.2,25,000 has been paid to the first respondent herein and the balance amount of

Rs.50,000 would be paid at the time of the complainant's making statement and no objection for quashing the FIR, which was retained in the court as per the direction of the court. It has further been averred that no dispute remained between the parties regarding the payment of dower amount (mehar), dowry articles, including the alleged jewellery gifts etc.

12. In view of the fact that the settlement was arrived at the intervention of a judicial officer of the rank of the Additional Sessions Judge, we are of the opinion, the contention of the first respondent herein to the effect that she was not aware of the contents thereof and the said agreement as also the affidavits which were got signed by her by misrepresentation of facts must be rejected. In the facts and circumstances of this case, we have no doubt in our mind that the denial of execution of the said deed of settlement is an afterthought on the part of Respondent 1 herein.

13. **Ex facie the settlement between the parties appears to be genuine. If the contention of the**

first respondent herein is to be accepted, she would not have accepted the sum of Rs.2,25,000 and in any event, she could have filed an appropriate application in that behalf before the court of S.N.Gupta, Additional Sessions Judge, Delhi. What was least expected of her was that she would return the said sum of Rs.2,25,000 to the appellants herein."

(Emphasis supplied)

The Apex Court came to the conclusion that in view of the conduct of the Respondent in entering into the settlement and continuance of the criminal proceedings was an abuse of process of law and was required to be quashed. In paragraph No.16 the Court held thus:

"16. **In view of the conduct of the first respondent in entering into the aforementioned settlement, the continuance of the criminal proceeding pending against the appellants, in our opinion, in this case also, would be an abuse of the process of the court. Appellant 1, however, would be entitled to withdraw the sum of Rs.50,000/- which has been deposited in the Court. We, therefore, in exercise of our jurisdiction under Article 142 of the**

Constitution direct that the impugned judgment be set aside. The first information report lodged against the appellants is quashed. The appeal is allowed. However, the order should not be treated as a precedent." (Emphasis supplied.)

17. A reference will have to be made to the decision of the Apex Court reported in (2005) 3 S.C.C. page 299 (Ruchi Agarwal v/s.Amit Kumar Agrawal and others) The Apex Court held in paragraphs 8 and 9 as under:

"8. Learned counsel appearing for the appellant, however, contended that though the appellant had signed the compromise deed with the abovementioned terms in it, the same was obtained by the respondent husband and his family under threat and coercion and in fact she did not receipt lump sum maintenance and her stridhan properties. We find it extremely difficult to accept this argument in the background of the fact that pursuant to the compromise deed the respondent husband has given her a consent divorce which she wanted, thus had performed his part of the obligation

under the compromise deed. Even the appellant partially performed her part of the obligations by withdrawing her criminal complaint filed under section 125. It is true that she had made a complaint in writing to the Family Court where section 125 Cr.P.C. proceedings were pending that the compromise deed was filed under coercion but she withdrew the same and gave a statement before the said court affirming the terms of the compromise which statement was recorded by the Family Court and the proceedings were dropped and a divorce was obtained. Therefore, we are of the opinion that the appellant having received the relief she wanted without contest on the basis of the terms of the compromise, we cannot now accept the argument of the learned counsel for the appellant. In our opinion, the conduct of the appellant indicates that the criminal complaint from which this appeal arises was filed by the wife only to harass the respondents.

9. In view of the aforesaid subsequent events and the conduct of the appellant it would be an abuse of the process of the court if the

criminal proceedings from which this appeal arises is allowed to continue."

18. Turning back to the facts of the case as observed earlier the Memorandum records receipt of a sum of Rs.3,76,896/- by the Respondent No.1. There is no dispute about the receipt of the amount mentioned in the Memorandum. In fact some of the cheques mentioned in the Memorandum at Exh.58 were encashed by the Respondent even before filing of the complaint. From the Memorandum it is crystal clear that the sum of Rs.3,76,896/- was accepted by the Respondent No.1 in settlement of money claim. What was sought to be canvassed by the Respondent No.1 is that the entire amount of Rs.8,90,680/- was to be paid by the Petitioner and on payment of Rs.5 lakhs before 10th September 1997, he was to withdraw the case. It is pertinent to note that all this does not find place in the document at Exh.58. It is also pertinent to note that when an attempt was made by the Petitioner to produce the said Memorandum in the Court in the year 1997, the Respondent No.1 did not come out with the case that some amount over and above the amount mentioned in the Memorandum was to be paid by the Petitioner to him. The only allegation made by the Respondent No.1 at that time was

that there is a fabrication of evidence on the part of the Petitioner. At no stage the Respondent No.1 till the recording of evidence, seems to have come out with the case that some more amount was to be paid for settlement over and above the amount mentioned in the Memorandum. In paragraph 13 of the cross-exmaination the Respondent No.1 admitted that there is no reference in Exh.58 or Exh.17 as regards the return of Rs.5,00,000/- by the Petitioner. It is also pertinent to note that though the some of the amount reflected in the Memorandum was received before the complaint was filed, the Respondent No.1 has not chosen to disclose the said fact in the complaint. There is no attempt made by the Respondent No.1 to return the amount received by him under the Memorandum. Moreover it some more amount was to be paid by the Petitioner, the Respondent No.1 could have taken up this stand immediately after Exh.17 was produced in the year 1997. However, the said stand is taken for the first time after 6 years.

19. Therefore, the oral evidence which is on record clearly discloses that the Memorandum was executed by the parties on 9th September 1997 under which the Respondent No.1 received a sum of Rs.3,76,896/-. He

admitted the contents of the said document on oath. The Memorandum specifically records that irrespective of the claim made by the Respondent No.1 in the Criminal Complaint, money matters involved in the case have been settled amicably. After having agreed to settle the dispute amicably and after having agreed to withdraw the complaint, the Respondent No.1 wants to prosecute the complaint only on the ground that he was to receive something more than what is mentioned in the written Memorandum. This stand has been taken nearly after seven years of the execution of Memorandum.

20. Considering the conduct of the Respondent No.1 it is certain that the continuation of the proceedings by him will amount abuse of process of law and therefore, the complaint deserves to be quashed. Accordingly the petition is allowed in terms of prayer clause (d).

21. The Respondent No.1 appearing in person prays that the operation of this order may be suspended for a period of 8 weeks. The prayer is opposed by the learned Counsel for the Petitioner. Considering the facts and circumstances of the case, operation of this order is suspended for a period of 8 weeks from today. However,

it is made clear that for a period of 8 weeks from today, the learned trial Judge will not proceed with the complaint. The parties are free to make appropriate application before the learned Magistrate regarding return of the documents. If such an application is made the same will be decided in accordance with law.

Judge.